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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 185.

SAMUEL McMILLEN, RONALD MORRISON, AND EBEN SMITH, PLAINTIFFS IN ERROR,

vs.

THE FERRUM MINING COMPANY, DEFENDANT IN ERROR.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

GEORGE R. ELDER,
Attorney for Plaintiffs in Error.

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Answering the brief of counsel for defendant in error, we desire to discuss some matters not touched upon in our opening brief.

On pages 7 and 8 of its brief defendant in error contends:

First. That the decision of the supreme court of Colorado is not reviewable by this court:

(*a.*) Because there was no ruling in the cause adverse to or in contravention of any express right, title, privilege, or immunity of plaintiffs in error under section 2320 of the Revised Statutes of the United States or any denial of or against any title, right, privilege, or immunity claimed by

plaintiffs in error under the statutes or laws of the United States.

(*b.*) Because any claim made by plaintiffs in error that the statute of the State of Colorado which requires the posting of a notice at the point of discovery is invalid, inconsistent with, repugnant to, and in contravention of section 2320 of the United States Statutes was not raised at the trial in the State court nor in the appeal to the supreme court of Colorado, and was raised, if at all, for the first time in the petition for a rehearing to the supreme court of Colorado.

Plaintiffs in error contend that it is and was their express right, title, privilege, and immunity under that part of section 2320 of the Revised Statutes of the United States which reads—

"No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located"—

to prove the presence of and their knowledge of its presence, and that one of plaintiffs in error, Samuel McMillen, as an owner in the original Pocket Liner Lode location, actually discovered in 1879 and 1880 a vein or lode of gold and silver ore in the Pocket Liner shaft at a depth of 90 to 120 feet in said shaft, and that this right, title, privilege, and immunity under section 2320 of the Revised Statutes was denied them by the ruling of the supreme court of Colorado in the following portion of their opinion (see R., fols. 373 and 374, p. 228):

"2. There is another reason for holding that plaintiffs may not avail themselves of that rule. It appears that they not only do not question the validity of our State statutes which prescribe certain acts as necessary to a valid location, but in their complaint they aver that in the location of the Eulalia lode the provisions of the State, as well as of the

Federal, statutes were complied with; and among the instructions which they themselves asked the court to give was one—applicable both to their own and the Golden Rod location—in which was the declaration that, as provided by section 2152, Mills' Annotated Statutes, a valid location of a lode mining claim cannot be made unless the locator sinks a discovery shaft upon the lode discovered to a depth of at least 10 feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary, to show a well-defined crevice, and unless he posts at the point of discovery on the surface a location stake containing certain designated things. Such being true, plaintiffs certainly cannot now be heard to say that they may at their will disregard these mandatory provisions of State legislation, which they themselves have invoked, for, if we assume their validity (which plaintiffs themselves do not question, and which they declare they have complied with), *the discovery shaft must expose the vein upon which the location of the Eulalia lode was based, or at least one vein;* **and a discovery elsewhere within the limits of the claim will not supply its place.** Beals *v.* Cone, 27 Colo., 473, 499; 62 Pac., 948; 83 Am. St. Rep., 92. Lindley on Mines, at section 250 (15), says that State courts have uniformly enforced provisions like those of ours concerning discovery shafts and posting of notices, notwithstanding doubts by the Interior Department, as to their validity. See, also, Van Zandt *v.* Argentine M. Co., 8 Fed., 725; 2 McCrary, 159; Argentine Min. Co. *v.* Terrible Min. Co., 122 U. S., 478; 7 Sup. Ct., 1356; 30 L. Ed., 1140, and Morrison's Mining Rights (9th ed.), 29. But as already shown, plaintiffs are not questioning their binding force and are not in a position to do so."

That this ruling was based on the first six assignments of error filed by plaintiffs in error in the trial court to the judgment and rulings of the district court of the fifth judicial district of the State of Colorado, which were as follows (see R., fols. 352–354, pp. 216 and 217):

"1. That the court erred in refusing to allow plaintiffs to prove by Thomas H. Thompson, the discovery and existence of a vein of gold and silver bearing ore in rock in place in

the Pocket Liner shaft within the limits of the Eulalia Lode mining claim prior to the location, staking and survey of the Eulalia Lode claim, and that Samuel McMillen one of the appellants, and plaintiffs below was one of the owners of the Pocket Liner Lode claim at the time of such discovery and disclosure of said vein; and knew and claimed at the time of the location and staking of the Eulalia Lode claim of the discovery and existence of a vein of gold and silver bearing ore in the Pocket Liner shaft within the limits of his location—the Eulalia Lode mining claim.

"2. That the court erred in refusing to allow plaintiffs to prove by witnesses M. M. McInnis and W. L. G. Smith the discovery and existence of a vein and body of gold and silver bearing ore opened by them; and from which vein and lode quantities of such ore were mined, shipped and sold by them to the Union Smelting Company; such work being done by the plaintiffs in this action through the workings of the Little Vinnie Lode claim from the three hundred eighty (380) foot level of the Little Vinnie shaft and while said property was under lease to some of these appellants.

"3. The court erred in refusing to admit in evidence in behalf of plaintiffs, smelter settlements, books of original entry of the Union Smelting Company, original receipts, checks, check stubs, control assays, bank deposit books, bank balance books and daily bank deposit books, checks and receipted bills of ore samplers, and scale weight bills—as documentary evidence of ore shipments and actual proof of the men in charge of the work of taking the ore from the vein within the southeast fraction of the Eulalia lode, and shipping the same to the smelter.

"4. The court erred in refusing to allow plaintiffs to prove what they discovered, opened and disclosed by their work done in the southeast Eulalia fraction from the three hundred eighty (380) foot level of the Little Vinnie claim, and which was shown in the stopes above their drift driven into their Eulalia claim.

"5. The court erred in holding that the United States statutes and the statutes of Colorado required plaintiffs to show an opening or openings within the lines of their Eulalia claim from any vein, lode or ledge discovered by them within the limits of their Eulalia claim to the surface of the earth; before plaintiffs could claim and prove a discovery

of such vein, lode or ledge from by or through workings having their only openings on territory outside the limits of their Eulalia Lode claim.

"6. That the court erred in holding that plaintiffs were prohibited by the injunction issued in the case of The Ferrum Mining Company *vs.* Samuel McMillen, Ronald Morrison and John McCombe a proceeding under section 159 of the Code of Colorado, from working in and upon the Pocket Liner shaft, and introducing evidence as to the vein discovered and disclosed in the north drift from said shaft while performing their annual assessment work for the years 1895, 1898 and 1899, the said premises being within the lines of their Eulalia Lode mining claim and a part and portion of the ground in controversy in this action, and being in the peaceful possession of the plaintiffs herein."

This ruling also came up upon the refused instructions of plaintiffs in error, assigned as errors, being No. 2, No. 4, and No. 5, assigned as errors, which were as follows (see R., fols. 36, 38, and 39, pp. 21 and 22):

"INSTRUCTION No. 2.

"The court further instructs the jury that although a discovery of mineral in rock in place is a necessary prerequisite to a valid location of a lode mining claim, yet such discovery does not necessarily have to be made in the location or discovery shaft. If a valid discovery of mineral in rock in place is made within the boundaries of the claim before any adverse rights have accrued, this would make his location a valid and legal one.

"GEORGE R. ELDER,
"*Attorney for Plaintiffs.*

"Refused.

"FRANK W. OWERS, *Judge.*

"Excepted to.

"GEORGE R. ELDER,
"*Att'y for Pl'ffs.*"

"INSTRUCTION No. 4.

"The court further instructs the jury that in a suit to determine the right of possession of a mining claim, it is incumbent upon the locator to show, not only a location upon ground in due form of law, but also to show that the location was made upon a vein or lode of quartz or other rock in place, bearing mineral, with the discovery or knowledge on the part of the locator, before the location was made of the existence of mineral.

"And under section 2320 Revised Statutes of the United States the locator of a mining claim is not required to be the original discoverer of the vein or lode. If, at the time of making the location there is the discovery of a vein or lode of quartz or other rock in place, and knowledge on the part of the locator of mineral there, the locator is entitled to make his location even though the discovery was first made by some one other than the locator.

"GEORGE R. ELDER,
"*Attorney for Plaintiffs.*

"Refused.

"FRANK W. OWERS, *Judge.*

"Excepted to.

"GEORGE R. ELDER,
"*Att'y for Pl'ffs.*"

INSTRUCTION No. 5.

"The court further instructs the jury that it is not necessary that the locator of a mining claim should be the first discoverer of a vein or lode, in order to make a valid location.

"It is sufficient if it be clearly shown that the locator knew at the time of making his location that there had been a discovery of a vein, or lode within the limits of his location but it must be known to him and claimed by him, in order to give validity to the location.

"GEORGE R. ELDER,
"*Attorney for Plaintiffs.*

"Refused.

"FRANK W. OWERS, *Judge.*

"Excepted to.

"GEORGE R. ELDER,
"*Att'y for Pl'ffs.*"

In Gross *vs.* United States Mortgage Co., 108 U. S., 477–484 this honorable court has decided that it is the duty of the court to examine the opinion of the supreme court in considering whether the case can be reviewed upon writ of error.

In that case Justice Harlan announces the rule in the following language:

"We cannot, therefore, doubt that in the existing state of the law it is our duty to examine the opinion of the supreme court of Illinois, in connection with other portions of the record, for the purpose of ascertaining whether this writ of error properly raises any question determined by the State court adversely to a right, title or immunity under the Constitution or laws of the United States, and specially set up and claimed by the party bringing the writ. Any difficulty existing upon this subject is removed by that provision of the Revised Statutes of Illinois, which requires, not only that the justices of the supreme court of the State shall deliver and file written opinions in cases submitted to it but, that, 'such opinions shall also be spread at large upon the records of the court.'"

It was also so held by this court in—

Gibson *vs.* Choteau, 8 Wall., 314.
Parmalee *vs.* Lawrence, 11 Wall., 36.
United States *vs.* Taylor, 147 U. S., 695–700.

That these questions were squarely presented to the trial court may be seen from the rulings upon the evidence of Thomas H. Thompson, one of the locators of the Pocket Liner lode (R., fols. 169 and 170, pp. 101 and 102):

"Q. Will you go on and state who did the location work of the Pocket Liner claim?

"Objected to by defendant as incompetent, immaterial and not tending to establish any issue in this case.

"The COURT: State the purpose.

"Mr. ELDER: The details of locating the claim.

"The COURT: Is that the only claim interested?

"Mr. ELDER: That is the original claim within the lines of which this discovery was made.

"The COURT: I sustain the objection unless Mr. Elder has a further and better reason. I don't see the materiality of any evidence with regard to the Pocket Liner claim; that is not in issue in this case. If you can show me the materiality of it I shall be glad to have you do so.

"A. I was at that time familiar with the lines of the Glengary Lode claim. I had a half interest in the Glengary claim and located the Pocket Liner at the side line of the Glengary at the north side line.

"Q. Will you state what you found in that shaft in the year 1879?

"Objected to by defendant as incompetent, immaterial and not tending to prove any issue in the case.

"The COURT: Let us hear from you, Mr. Elder, why you want to show what was in that shaft.

"The jury were thereupon excused for thirty minutes.

"Mr. ELDER: The proposition of the plaintiffs is simply this: That Mr. McMillen, as an owner and a locator of the Eulalia lode, knew at the time he placed his stake upon the Eulalia claim on the 30th of May, 1893, that he, in company with his co-owners of the Pocket Liner claim, had discovered ore in the shaft of the Pocket Liner claim; that at the moment that he placed his stake upon that ground claiming the Eulalia claim as abandoned and unoccupied territory, that theretofore there had been a discovery of mineral within the requirements of the statutes of the United States and of the State of Colorado, and that that knowledge within the mind of Mr. McMillen constituted a complete, final, and perfect location of that mining claim, provided he did the other things requisite under the statutes of the State of Colorado, by sinking a discovery shaft ten feet in depth, etc., etc.

"The COURT: I cannot agree with you. Our statute is clear as to what is required, and it has become almost elementary. You must go either upon the vein and make your discovery or you must go into the shaft in which the vein has already been discovered and do some work. The objection will be sustained.

"To which ruling of the court plaintiffs, by their counsel, then and there duly excepted."

So, also, the map and evidence of W. L. G. Smith, surveyor, and M. N. McInnis, miner:

EVIDENCE OF W. L. G. SMITH.

"Q. Will you state if you have made a correct map of the underground workings of the Eulalia lode on the side line of the Little Vinnie lode? A. I did.

"Q. Have you such a map? A. Yes.

"Q. Is this the map, sir?

"Mr. CAVENDER: I object to that; it appears from the testimony that is underground working from the Little Vinnie claim into the Eulalia claim. We object upon the ground that it is improper to make a showing in such workings, and there is no testimony of any working through the Little Vinnie claim that can be proved to show a discovery of mineral in this case; in other words, a discovery in one claim cannot be made through the workings of another; that you cannot make a secret discovery under the statutes of this State, especially with reference to relocations.

"Mr. ELDER: Now, if your honor please, we are offering this in evidence to show that in the year 1894 Mr. Ronald Morrison, Mr. John McCombe and Mr. Samuel McMillen, the owners of that property, did their annual assessment upon the Eulalia lode from the underground workings of the Little Vinnie lode.

"Second. We offer that in case of the working of the Eulalia lode and the shipping of ore or the discovery of mineral in either the drift, or the stopes above the drift during the period of the year 1894; that would be a sufficient discovery of mineral in the failure of a discovery by other parties prior to that period of time, and that such a discovery would inure to and relate back to the original location of this claim upon the ground, and in support of that proposition I desire to call the court's attention to a case within the last year, heard in your honor's court, in which a discovery was made underground from the Price shaft, and in which I believe Mr. Estey was interested, and which discovery was made underground from a shaft formerly upon the conflicting location.

"The COURT: Connected to the surface through their ground in that case, if I remember.

"Mr. ELDER: So there is a connection through the Little Vinnie shaft.

"The COURT: But not through Eulalia ground. You

should offer this for two purposes, and I am not passing upon the first purpose at this time. You should offer it first to show the assessment work and you should offer it next to prove a discovery.

"Mr. ELDER: If necessary we will prove an ample discovery in the other shaft.

"The COURT: Well, it is a second string to your bow. If you should offer it to prove a discovery you must in some way show that it was accessible from the ground claimed by you and on which it is intended to constitute the discovery. In other words, you must have had an opening to the surface on that ground which would have made or constituted visible notice to somebody intending to locate that a discovery might exist at the bottom of that opening, which would put them on their guard and be notice to them which they would be compelled to accept and could not plead ignorance of.

"Mr. ELDER: Does your honor hold that the United States statute requires any such thing?

"The COURT: I hold most emphatically this, *that you cannot have a secret or concealed discovery from an opening on another claim or on Government land.*

"Mr. ELDER: Does the court assume that this was a secret discovery of any kind?

"The COURT: There was nothing, as far as I see the evidence now. I may be mistaken. This particular part which you point out which appears to be colored light blue, you have shown no opening from the Eulalia ground connecting with that drift. Perhaps I can explain the position to you in this way: Suppose I had been walking over the Eulalia claim with the idea of seeing what there was on the ground, believing it to be vacant, unoccupied domain; that drift might have existed there, and undoubtedly did exist, 300 or 400 feet under ground, and yet it would not give me the slightest notice. There must be something on the ground to give notice of a discovery to constitute a discovery.

"Mr. ELDER: Then your honor rules that our complete conformance to the location requirements of the United States statutes and the statutes of Colorado with reference to staking and having a discovery shaft is not sufficient notice to the world of our claim of the property.

"The COURT: What I hold, Mr. Elder, at this time is, that you cannot introduce evidence of that drift for the

purpose of establishing a discovery on the Eulalia ground unless you show an opening or visible connection with the surface of the Eulalia ground which would have constituted notice to any one intending to locate the same. Now I am not passing upon your assessment work.

"Mr. ELDER: I would like the court to pass on the assessment work.

"Mr. EWING: We will concede they did $100 worth of work within the boundaries of the claim in the year 1894.

"The COURT: Then you don't need any offer on that point.

"Mr. ELDER: Now, as to the second offer, the court at the present time rules that we cannot introduce that map for the purpose of showing a discovery, from the underground workings of the Little Vinnie claim.

"The COURT: Unless you can show an opening to the surface of the Eulalia claim.

"To which ruling of the court, plaintiffs, by their counsel, then and there duly excepted."

R., fols. 153, 155, 156, 157, 158, pp. 92, 93, 94.

"M. N. McInnis, witness for plaintiff, pp. 58 and 59, Abstract—Miner; have mined upon Breece hill; mined on the Little Vinnie in December, 1894; am familiar with the underground workings of the Little Vinnie, yes, sir, part of it; and familiar with what is known as the 380-foot level of the Little Vinnie.

"Q. Do you know of any work having been done from that level towards the Eulalia Lode claim in the fall? A. We have an upraise; we have a stope there in that level.

"Q. Did you see any ore on the line of the Eulalia lode—common line of the Little Vinnie and the Eulalia lode?

"Objected to by defendant.

"The COURT: What is the purpose of it?

"Mr. ELDER: We are going to prove we shipped ore from that ground.

"The COURT: They will perhaps admit that you did.

"Mr. EWING: No, we will not admit that; but this comes under the same objection.

"And the court sustained such objection.

"The court has already decided that such a drift does not constitute a discovery.

"To which ruling of the court, plaintiffs, by their counsel, duly excepted."

R., fol. 160, p. 95.

These offers of evidence with argument of counsel clearly called to the attention of the court the contention that under section 2320, United States Revised Statutes, and section 3154, Mills' Annotated Statutes of Colorado (designated by us as the equivalent statute for discovery shaft), we were entitled to make this proof and were denied it by the court, whose ruling was based solely and alone upon the inhibitory and inconsistent construction of sections 3150 and 3152, Mills' Annotated Statutes of Colorado, and of which we complain.

This comes squarely under the rule announced by Chief Justice Fuller in Sayward *vs.* Denny, 158 U. S., 180:

"(6.) The right on which the party relies must have been called to the attention of the court, in some proper way, and the decision of the court must have been against the right claimed. Hoyt *v.* Thompson, 1 Black, 518; Maxwell *v.* Newbold, 18 How., 515. (7.) Or, at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly involved, so that the State court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the State court can be held to have disposed of such Federal question by its decision. Powell *v.* Brunswick Co., 150 U. S., 433, 439."

The case of Meyer *vs.* Richmond, 172 U. S., 82, cited by defendant in error, is not at all analogous to the case in hand. The United States Government does not own the streets of the city of Richmond, as it certainly still does own the ground in controversy in this suit. The claim of right in the Meyer case was under the fourteenth amendment to the United States Constitution, while the case at bar is under the direct grant of Congress and section 2320, United States Revised Statutes, prescribing its limitations and privileges to the locator and prospector.

Again, in Citizens' Savings Bank *vs.* Owensboro, 173 U. S., 636, cited by counsel, the question was simply and solely a local statute of taxation.

The case of Bushnell *vs.* Cooke Mining and Smelting Co., 148 U. S., 682, cited by counsel, was determined below on a question of the course of the vein.

Two of the cases cited by defendant in error upon the question of jurisdiction have an even narrower claim for review. They are—

Blackburn *vs.* Portland Gold Min. Co., 175 U. S., 571.
Shoshone Min. Co. *vs.* Rutter, 177 U. S., 505.

In these cases plaintiffs in error sought to pursue their writs exclusively under the claim that they were ejectment adverse suits over Government land, brought in support of adverses filed in the United States land office, and they relied upon that ground simply and solely. There was no claim of a conflict of construction between two sections of the statutes of Colorado and section 2320 of the United States Revised Statutes and the grants of Congress to discoverers of lode claims.

We leave this matter as we stated in our opening brief, "that as we understand the law" the facts of each case are the final test of its review.

Second. We make no question that the provisions for survey, staking, depth, and dimensions of shaft, and length of cuts on the vein are distinctly committed to the State legislatures, but we do take issue with counsel in a case like the one at "bar" where it appears from the record that both claimants have failed to place a discovery notice at the point of discovery of the vein on the surface; that it is worse than a work of supererogation to discuss, as counsel does in the third paragraph on page 17, whether the Colorado statute on discovery notices is mandatory or not. If it is mandatory and defendants in error have failed

to obey it there is a fatal error in their case, and the supreme court of Colorado should have reversed their judgment for that reason alone.

The testimony of Mr. Jaycox, civil engineer (R., fols. 286, 287, 288, and 289, pp. 177, 178, and 179), was all that was given of the staking and survey of the Golden Rod lode for their second amended location certificate recorded March 8, 1895 (see R., fols. 293–295, pp. 181, 182, and 183), and there was no evidence introduced of posting a discovery notice or discovery stake at the Pocket Liner shaft by defendant in error.

On the other hand, if, as we claim, that notice cannot be so stringently construed, the rulings of the trial court and the supreme court of Colorado should be reversed and plaintiffs in error be allowed to try this case without being hampered with these narrow constructions and reasonings based on the grants of the United States statutes.

Counsel state, page 17 of their brief:

"The State statute requires the sinking of the discovery shaft on the lode, not at some other point within the boundaries of the claim."

What counsel means is that sections 3150 and 3152, Mills' Annotated Statutes of Colorado, attempt to do that and we are unwilling sufferers to prove the everlasting truth of the fact that the trial court and the supreme court of Colorado agreed with him.

But our contention is that section 3154, Mills' Annotated Statutes of Colorado, which we have called the "equivalent statute," and which is in words as follows:

"3154. Any open cut, cross-cut or tunnel which shall cut a lode at the depth of ten feet below the surface, shall hold such lode, the same as if a discovery shaft were sunk thereon, or an adit of at least ten feet in along the lode from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft,"

can by no such construction be cut out of the act of February 13, 1874, since its logical legal intendment is in furtherance

of a more liberal construction and application of section 2320 of the Revised Statutes of the United States.

Further on, counsel says, bottom of page 17 and top of page 18 of brief:

"This question has been fully considered under a similar State statute by the supreme court of Utah in the case of Copper Globe Mining Company *vs.* Allman, 23 Utah, 410, and also by the United States circuit court of appeals of the ninth circuit, in the case of Nevada Sierra Oil Company *vs.* Home Oil Company, 98 Fed., 674, in which Judge Ross uses the following language:

"'It is also true as a matter of law that it is not necessary that a locator should be the first discoverer of mineral upon the land in order to make a valid location; but he must not only have knowledge of the former discoveries, but such actual discovery must be adopted and claimed by him in order to give validity to his location.'"

If it had been permitted to plaintiffs in error to have discovered, in the decisions of the mining States, the Federal courts, and the National Supreme Court, any such construction as claimed by defendant in error of sections 3150, 3152, Mills' Annotated Statutes of Colorado, as established and determined when construed with the "equivalent statute," section 3154, Mills' Annotated Statutes of Colorado, and section 2320, Revised Statutes of the United States, we would not now be asking the time of the Supreme Court of the United States to differentiate between the clauses and terms of these sections.

As the case Kendall *vs.* San Juan Silver Mining Co., 144 U. S., 658, is cited in support of counsel's theory, we must remind him that claimant filed no location certificate whatever on his claim after the opening of the reservation, and that the court properly held that a prior filing would not aid claimant, so that there is no analogy between that case and the case at bar.

Third. On pages 6 and 7, plaintiffs attempt to support the erroneous ruling of the trial court giving the instruction No. — for defendant in error (R., fol. 31, p. 17):

"INSTRUCTION No. —.

"You are further instructed that if you find that, on or about the 10th day of March, A. D. 1894, or prior thereto, the defendant or its grantors, or the lessees of its grantors, did discover a vein or lode of mineral in rock in place, within the boundaries of the Golden Rod Lode mining claim, and that the defendant or its grantors complied with the requirements of the laws as to staking said Golden Rod Lode claim and recorded a location certificate within the time required by law, then you will find for the defendant.

"CHAS. CAVENDER,
"JOHN A. EWING,
"*Attorneys for Defendant.*"

"Given.

"FRANK W. OWERS, *Judge.*"

"Excepted to.

"GEORGE R. ELDER,
"*Att'y for Pl'ffs.*"

Which, with the admitted testimony of John King (R., fols. 212–219, pp. 128 to 135) and the admitted testimony of Eugene Stevens as to the following assay card, Defendant's Exhibit C (see R., fols. 221 and 222, p. 134; 215, p. 130), as follows:

"COPY DEFENDANT'S EXHIBIT 'C.'

"Office of Eugene Stevens, assayer, 110 East Fourth St.

"LEADVILLE, COLO., *Mar.* 10, 1894.

"This certifies, that the sample of ore, said to be from the —— lode, assayed for Mr. King gave the following result per ton:

No.	Marks.	Silver ounces.	Gold ounces.	Lead per ct.	Iron per ct.	Mang. per ct.	Silica per ct.	Copper per ct.	Zinc per ct.
1	.....	7	03-100	.....	.....	.....	.....	.....	.....
2	.....	.....	.....	.....	.....	.....	.....	.....	.....
3	.....	.....	.....	.....	.....	.....	.....	.....	.....
4	.....	.....	.....	.....	.....	.....	.....	.....	.....
5	.....	.....	.....	.....	.....	.....	.....	.....	.....
6	.....	.....	.....	.....	.....	.....	.....	.....	.....
7	.....	.....	.....	.....	.....	.....	.....	.....	.....

"Limberg Golden Rod.

"EUGENE STEVENS, *Assayer.*

"Whipple, printer.
"Copy Def't's Ex. C."

"Eugene Stevens, being called as a witness for the defendant and duly sworn, testified as follows:

"Direct examination by Mr. EWING:

"Q. You are an assayer, are you? A. Yes, sir.

"Q. Were you such in 1894? A. Yes, sir.

"Q. Doing business where? A. On Fourth street.

"Q. In Leadville, Colorado? A. Yes, sir.

"Q. Do you know Mr. King, the gentleman who has just left the stand? A. Yes, sir.

"Q. I will ask you if he brought you any material in the year 1894 on or about the 10th of March for assaying? A. Yes, sir.

"Q. I will ask you if you assayed it? A. I did.

"Q. I will ask you if you gave him a card showing what that assay was? A. Yes, sir.

"Q. I will ask you to look at Exhibit 'C' and state to the court and jury whether or not that was what you gave him? A. Yes, sir; that is my writing.

"Q. Does that correctly represent the contents of the material which was assayed by you and brought by him to you for assay? A. Yes, sir; it does.

"Exhibit 'C' offered in evidence by defendant. Plaintiffs object to the introduction of Exhibit 'C' of defendant bearing date March 10th, 1894 purporting to be an assay card, for the reason that it is not established that the material came from the lode, ledge or vein of mineral in rock in place in the discovery shaft of the Golden Rod Lode mining claim.

"2. Plaintiffs object to Exhibit 'C' for the reason that it is not shown that the material of which this is supposed to be an assay came from a lode, ledge or vein of mineral of rock in place in the limits of the Golden Rod Lode mining claim.

"3. For all of the objections made to the original lease and the record of location.

"The COURT: The understanding is that you are going to connect this with the lode?

"Mr. EWING: Certainly.

"The COURT: *With the understanding that it is to be connected with a lode in rock in place it will be admitted.* To which ruling of the court plaintiffs duly excepted."

was admitted upon the distinct understanding that it was to be connected with a lode in rock in place, and the court can search the testimony in vain to find any one swearing to a vein six feet from the shaft, the point where John King said he got the material. (See R., fol. 216, p. 130.)

"Q. I will ask you to state whether or not that is the card given to you as the assay of the material taken from this drift? A. Yes, sir; that is the card, because I went and seen his books.

"Q. Whereabouts in the drift was that taken? A. About six feet from the shaft.

"Q. About six feet from the shaft? A. Yes, sir."

No witness was even interrogated as to a vein at a point six feet from the shaft, and, on the contrary, Boehmer, Mudd, Curley, and McDonald, the witnesses of appellee, all swore there was none there.

We are speaking of this last assay only to enlighten the court that an assay of the bare porphyry in that drift act-

ually did run higher than their jointure plane and cleavage material.

Taking this apparent contradiction and the further glaring contradictions on the size of these cleavages, some of appellee's witnesses swearing to four inches in size when none of appellants' witnesses could find these cleavages greater than or even equal to one-half inch in thickness; the further fact that Charles Slavin, one of appellee's lessees in the work, testifying that the whole drift was nothing but porphyry and there were no veins there at all, and he was the only miner on the stand who drove through that porphyry, we do not understand the reasons for the supreme court of Colorado sustaining the judgment below.

This ruling of the court bore with peculiar hardship upon appellants in this, that the appellee introduced five witnesses to prove some six veins or lodes in place in a drift forty-five feet long. They were John King, Max Boehmer, S. W. Mudd, John R. Curley, and Jesse F. McDonald. They placed these lodes at points four, six, fifteen, nineteen, forty, and forty-five feet from the edge of the shaft. The appellants introduced four witnesses to the effect that these appearances were clay slips, jointures, cleavages, and cracks in the porphyry, with no definite course to them, and that there was no demonstration of the fact that any one of them was a vein. Charles Slavin, one of the lessees of appellee, who ran the drift himself, swore that there was no vein or lode in that drift. The assays presented by Jesse F. McDonald to prove the presence of gold and silver in these pretended veins and lodes were not in the least higher than what Professor Emmons, the engineer and geologist in charge of the geological survey of Leadville, found to be the average silver and gold contents of the pyritiferous porphyries of Breece hill, his examinations discarding all material taken from the jointure planes of the porphyry and taking extensive precautions to eliminate the presence of all fractions of silver

or gold in the litharge used in the assays, which does not appear to have been done by Mr. Stevens.

We quote page 580, *Geology and Mining Industry*, of Leadville:

"The average assay of the ten specimens of pyritiferous porphyry is 0.2773 ounce Ag. per ton; but one of these might be considered abnormal, since it alone contains more than the sum of the other nine. Rejecting this, the average of the other nine specimens is 0.0265 ounce Ag."

Again, page 583:

"From Table IV the average of ten specimens assayed for silver is found to be 0.2773 ounce per ton, or, rejecting the richest of these ten specimens as above the normal, the average of the remaining nine specimens is 0.0265 ounce silver per ton of pyritiferous porphyry."

On page 580 Professor Emmons calls attention to a larger concentration of mineral at the jointure planes of the rock:

"Both pyrite and galena are occasionally found, however, coating the jointing planes of the rock, in which case they are undoubtedly secondary."

We copy from Table IV, page 594:

"23—Pyr. por., shaft W. of Tribune, Breece hill, 2.533 Ag. No Au.
"24—Pyr. por., Hartford shaft, Breece hill, 0.08 Ag. Trace Au.
"25—Pyr. por., Montana shaft, Breece hill. 0.013 Ag. Trace Au.
"28—Pyr. por., So. Fork, White's gulch, 0.033 Ag.
"29—Pyr. por., Comstock tunnel, White's gulch, 0.033 Ag.
"34—Pyr. por., Rebel Warrior shaft, Ball Mt., 0.023 Ag."

The assays presented by appellees from their veins were as follows:

No. 1—Vein No. 4, no Ag.; 0.13 Au.
No. 2—Vein No. 4, 0.04 Ag.; 0.11 Au.

No. 3—Vein No. 3, trace Ag.; 0.09 Au.
No. 4—Vein No. 2, 0.5 Ag.; 0.02 Au.
No. 5—Vein No. 1, 0.5 Ag.; 0.01 Au.

Another assay introduced by them, but not proved as connected with a vein or lode, was 7 oz. Ag.; .03 oz. Au.

The latter assay and the best one presented by appellees was sworn to as coming from that drift at six feet from the shaft. It was permitted to go to the jury over the objection of appellants, with the understanding that, as stated by the court (R., fol. 216, p. 130):

"The COURT: With the understanding that it is to be connected with a lode in rock in place it will be admitted."

This error was material and assignment of error No. 26 in the trial court (R., fol. 363, p. 222), being to the giving of instruction No. 4, based upon it, asked by the defendant in error below, where the date of the assay card admitted in evidence, March 10, 1894, is made the basis of their discovery.

On pages 134–135 (R., fols. 222, 223), the photograph of map made by Max Boehmer, are displayed all the veins Mr. Boehmer could find. In his testimony he says he found a vein four feet from the shaft about two or three inches thick. John R. Curley states that vein was "a short distance from the shaft, perhaps two or three feet, probably an inch and a half to two inches and a half wide."

S. W. Mudd states:

"About four feet from the shaft, there was a vein crossing the drift at right angles and dipping to the southwest."

J. F. McDonald states:

"At a point four feet from the side of the shaft is a vein cutting across at nearly right angles, from one to two inches thick."

There was no testimony as to what existed at any point from a point four feet from the shaft to a point fifteen or sixteen feet from the shaft. Now, skilled experts like Mr. Mudd and Mr. Boehmer, who can find veins as small as from one-fourth of an inch to one-half of an inch in size in blank porphyry, are not going to miss a vein at six feet from the shaft which seemed to assay fourteen or fifteen up to thirty and forty times what they could find in the immense veins they testified to.

To cut it short, the admission of that assay card was material error, and undoubtedly influenced the jury, and the instruction based on the date of the card—No. 4, March 10, 1894—should not have been given to the jury. This evidence ought to have acted as a boomerang to the defendant's case. If it proves anything, it proves that the red porphyry in that drift has more gold and silver contents than the small cleavages, jointure planes, and slips and seams in the porphyry which the defendant's experts searched and researched, assayed and reassayed, sampled and resampled, and then could get but a trifle better returns than Professor Emmons secured from the raw pyritiferous porphyries, and in his report he takes pains to state that his samples did not come from the jointure planes and cleavage planes of the porphyries. If the court will study the cross-examination of Messrs. Boehmer and Mudd, they will discover that the drift is cracked and broken from end to end with slips and cleavage planes, and that when boiled down it is only a blind porphyry drift from end to end.

We did not intend to refer to the erroneous rulings of the trial court so overwhelmingly in the favor of defendant in error, but the counsel having referred to this branch we felt called upon to reply.

Respectfully submitted.

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